Supreme Court, U. S.
FILED
MAY 3 1980
MICHAEL RODAK, JR., CLERK

Nos. 79-1384, 79-1394, and 79-1395

In the Supreme Court of the United States

OCTOBER TERM, 1979

EXXON CORPORATION, PETITIONER
v.
UNITED STATES OF AMERICA

SHELL OIL COMPANY, PETITIONER
v.
UNITED STATES OF AMERICA

MARATHON OIL COMPANY, PETITIONER
v.
UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General

ALICE DANIEL
Assistant Attorney General

WILLIAM G. KANTER
ROBERT J. FRANZINGER
ANN F. COHEN
THOMAS R. KLINE
Attorneys
Department of Justice
Washington, D.C. 20530

INDEX

Page

Opinions below 1

Jurisdiction 1

Question presented 2

Statutes involved 2

Statement 4

Argument 10

Conclusion 19

CITATIONS

Cases:

American Maritime Ass'n v. *Blumenthal*, 458 F. Supp. 849, aff'd, 590 F. 2d 1156, cert. denied, 441 U.S. 943 15

Chrysler Corp. v. *Brown*, 441 U.S. 281 15

Oklahoma Press Publishing Co. v. *Walling*, 327 U.S. 186 17

Reisman v. *Caplin*, 375 U.S. 440 16

TVA v. *Hill*, 437 U.S. 153 12

United States v. *Caceres*, 440 U.S. 741 16

Vermont Yankee Nuclear Power Corp. v. *NRDC*, 435 U.S. 519 16

Statutes and regulations, and rules:

Administrative Procedure Act:

5 U.S.C. 555(d) 16

5 U.S.C. 706 17

Page

Statutes and regulations, and rules—(Continued):

Department of Energy Organization Act, 42 U.S.C. (Supp. I) 7101 *et seq.* :

Section 109, 42 U.S.C. (Supp. I) 7112 10

Section 109(9), 42 U.S.C. (Supp. I) 7112(9) 11

Section 109(12), 42 U.S.C. (Supp. I) 7112(12) 11

Section 109(17), 42 U.S.C. (Supp. I) 7112(17) 11

Section 203(a)(7), 42 U.S.C. (Supp. I) 7133(a)(7) 11

Section 205(a)(1), 42 U.S.C. (Supp I) 7135(a)(1) 11

Section 205(a)(2), 42 U.S.C. (Supp. I) 7135(a)(2) 11

Section 205(c), 42 U.S.C. (Supp. I) 7135(c) 11

Section 301(a), 42 U.S.C. (Supp. I) 7151(a) 3, 4, 10

Section 645, 42 U.S.C. (Supp. I) 7255 ..... 3, 4, 6-7, 10, 12

Section 657(5), 42 U.S.C. (Supp. I) 7267(5) 11

Page

Statutes and regulations, and rules—(Continued):

Federal Energy Administration Act, 15 U.S.C. 761 *et seq.* :

Section 13(e), 15 U.S.C. 772(e) 4, 10

Section 13(e)(1), 15 U.S.C. 772(e)(1) 3, 10

Section 15(d), 15 U.S.C. 774(d) 10

Section 52(b)(1), 15 U.S.C. 790a(b)(1) 11

Federal Trade Commission Act, Section 9, 15 U.S.C. 49 4

Petroleum Marketing Practices Act, 15 U.S.C. (Supp. II) 2801 *et seq.* :

Section 202, 15 U.S.C. (Supp. II) 2822 13

Section 203(a), 15 U.S.C. (Supp. II) 2823(a) 13

Section 301, 15 U.S.C. (Supp. II) 2841 ..... 2, 4, 9-10

Section 301(c), 15 U.S.C. (Supp. II) 2841(c) 5, 12, 13

Section 301(d)(1), 15 U.S.C. (Supp. II) 2841(d)(1) 5, 14

Page

Statutes and regulations, and rules—(Continued):

10 C.F.R. 205.1 6
10 C.F.R. 205.8(h) 6, 7
10 C.F.R. Parts 209-214 ..... 6, 15
43 Fed. Reg. 41422 (1978) 5
44 Fed. Reg. 3548 (1979) 5
44 Fed. Reg. 3552 (1979) 5
Fed. R. App. P. 41(a) 9

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1384
EXXON CORPORATION, PETITIONER
v.
UNITED STATES OF AMERICA

No. 79-1394
SHELL OIL COMPANY, PETITIONER
v.
UNITED STATES OF AMERICA

No. 79-1395
MARATHON OIL COMPANY, PETITIONER
v.
UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a)[1] is not yet reported. The opinion of the district court (Pet. App. 29a-36a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 26, 1980 (Pet. App. 23a-24a). The petition for a

[1]Unless otherwise indicated, "Pet. App." refers to the appendix in No. 79-1384.

writ of certiorari in No. 79-1384 was filed on March 7, 1980; the petitions in Nos. 79-1394 and 79-1395 were filed on March 10, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Department of Energy subpoenas seeking information for a study mandated by Congress were lawfully issued for a purpose within the authority of the agency and were properly enforced.

STATUTES INVOLVED

Title III of the Petroleum Marketing Practices Act, 15 U.S.C. (Supp. II) 2841, provides, in pertinent part:

> (a) The Secretary of Energy, in consultation with the Chairman of the Federal Trade Commission and the Attorney General and other agencies as the Secretary deems appropriate, shall conduct a study of the extent to which producers, refiners, and other suppliers of motor fuel subsidize the sale of such motor fuel at retail or wholesale with profits obtained from other operations.
>
> (b) Such study shall examine—
>
> (1) the role of vertically integrated operations in facilitating subsidization of sales of motor fuel at wholesale or retail;
>
> (2) the extent to which such subsidization is predatory and presents a threat to competition;
>
> (3) the profitability of various segments of the petroleum industry;
>
> (4) the impact of prohibiting such subsidization on the competitive viability of various segments of the petroleum industry, on prices of motor fuel to consumers and on the health and structure of the petroleum industry as a whole; and
>
> (5) such other matters as the Secretary considers appropriate.

Section 13(e)(1) of the Federal Energy Administration Act, 15 U.S.C. 772(e)(1), provides:

> The Administrator, or any of his duly authorized agents, shall have the power to require by subpoena the attendance and testimony of witnesses, and the production of all information, documents, reports, answers, records, accounts, papers, and other data and documentary evidence which the Administrator is authorized to obtain prusuant to this section.

Section 301(a) of the Department of Energy Organization Act, 42 U.S.C. (Supp. I) 7151(a), provides, in pertinent part:

> Except as otherwise provided in this chapter, there are transferred to, and vested in, the Secretary all of the functions vested by law in the Administrator of the Federal Energy Administration * * *.

Section 645 of the Department of Energy Organization Act, 42 U.S.C. (Supp. I) 7255, provides:

> For the purpose of carrying out the provisions of this chapter, the Secretary, or his duly authorized agent or agents, shall have the same powers and authorities as the Federal Trade Commission under section 49 of Title 15 with respect to all functions vested in, or transferred or delegated to, the Secretary or such agents by this chapter.

Section 9 of the Federal Trade Commission Act, 15 U.S.C. 49, provides, in pertinent part:

> For the purposes of this subchapter the Commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any person, partnership, or corporation being investigated or proceeded against; and the Commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation.

STATEMENT

1. The United States initiated these actions to enforce three identical subpoenas duces tecum issued to petitioners on January 22, 1979, by the Department of Energy (Pet. App. 42a-46a). Statutory authority for issuance of the subpoenas was provided by Section 645 of the Department of Energy Organization Act (DOEOA), 42 U.S.C. (Supp. I) 7255, and Section 13(e) of the Federal Energy Administration Act (FEAA), 15 U.S.C. 772(e).[2] The subpoenas sought source information for a study mandated by Congress in Title III of the Petroleum Marketing Practices Act (PMPA), 15 U.S.C. (Supp. II) 2841. In that statute, Congress directed the Secretary of Energy to investigate "subsidization"—"the extent to which producers, refiners, and other suppliers of motor fuel subsidize the sale of such motor fuel at retail or wholesale with profits obtained from other operations."

[2]The subpoena power granted to the FEA Administrator by Section 13(e) of the FEAA was transferred to the Secretary of Energy by Section 301(a) of the DOEOA, 42 U.S.C. (Supp. I) 7151(a).

The Director of the Office of Competition in DOE's Office of Policy and Evaluation is the administrative official charged with the responsibility of preparing a draft of the report on subsidization to be submitted to Congress in accordance with Section 301(d)(1) of the PMPA. He issued the subpoenas to petitioners pursuant to a delegation of authority from the Secretary (79-1394 Pet. App. 104a-107a).

2. In accordance with Section 301(c) of the PMPA, 15 U.S.C. (Supp. II) 2841(c), DOE published a notice describing the statutory requirement that it conduct a subsidization study. 43 Fed. Reg. 41422 (1978). The DOE notice announced the date of a public hearing to consider the procedures DOE should adopt in conducting the study and invited comments from interested persons. All three petitioners submitted comments. After considering the written submissions of petitioners and others and the comments made at the October 1978 hearing, DOE developed a plan for the study required by the PMPA and published it in the Federal Register. 44 Fed. Reg. 3548 (1979). DOE stated that, in order to obtain "[i]nternal planning and financial documents" that it believed were necessary for completion of the task set by Congress, it would subpoena information from nine oil companies. *Id.* at 3552.[3]

[3]DOE's notice explained that the nine companies to be subpoenaed "will likely include the largest marketers, those that conduct operations in the chosen regions, those refiners who have accounted for the increase in the refiner owned and operated retail outlets, and those firms that represent a mix of the types of marketing strategies and public accounting records used in the industry." 44 Fed. Reg. 3552 (1979).

Nine identical subpoenas were issued in January 1979 (Pet. App. 42a-46a). DOE thereafter entered into negotiations with all nine affected companies concerning the production of the requested materials. Six of the companies reached settlement agreements with DOE, and they produced substantially all of the documents sought by the agency.[4] Petitioners attempted to quash the subpoenas at the administrative level, but DOE informed them (Pet. App. 41a) that the administrative review procedures provided in 10 C.F.R. 205.8(h) (1978) (reprinted in Pet. App. 100a-101a) apply only to subpoenas issued in connection with the specific agency functions described in 10 C.F.R. Parts 209-214 and not to subpoenas issued for the purpose of the PMPA study.[5] When attempts to obtain voluntary compliance by petitioners failed, the government filed petitions to enforce the DOE subpoenas in the United States District Court for the District of Columbia.

3. The district court enforced the subpoenas (Pet. App. 27a-36a), holding that the PMPA study fell within the general responsibilities assigned to DOE under the agency's enabling act and that therefore the subpoenas were authorized by Section 645 of the DOEOA, 42 U.S.C.

---

[4]The six companies with which DOE reached agreement are Ashland Oil, Company, Altantic Richfield Oil Company, Clark Oil & Refining Company, Gulf Oil Corporation, Standard Oil Company (Indiana), and Texaco, Inc.

[5]In reaching this conclusion, DOE relied on 10 C.F.R. 205.1, which states:

> This part establishes the procedures to be utilized and identifies the sanctions that are available in proceedings before the Department of Energy and State Offices, in accordance with Parts 209 through 214 of this chapter.

(Supp. I) 7255. The court rejected petitioners' argument that the language and legislative history of Title III of the PMPA evidence Congress' intent that the subsidization study be conducted solely through the voluntary cooperation of the oil companies, without resort to subpoenas (Pet. App. 32a). The court also rejected the contention that the Secretary's subpoena power is limited to investigation of particular firms' compliance with existing law and does not extend to studies of industry-wide conditions (*id.* at 34a). The court ruled that "the subpoenas are not burdensome or unreasonable in view of the information sought and the requirements of the PMPA" (*id.* at 35a).

In addition, the district court sustained DOE's refusal to provide an administrative review procedure by which petitioners could seek to quash the subpoenas. The court held that the procedures described in 10 C.F.R. 205.8(h) (1978) do not apply to subpoenas issued for purposes of the PMPA study and that petitioners' due process rights were adequately protected by the opportunity to be heard in district court before judicial enforcement of the subpoenas (Pet. App. 34a-35a).

4. A divided panel of the court of appeals affirmed (Pet. App. 1a-22a). The court observed that Title III of the PMPA "specifically *instructs* DOE to conduct a study which the agency would in any event *be permitted* to conduct under its broad general DOEOA mandate" (*id.* at 5a). The court therefore held that the general subpoena authority conferred by 42 U.S.C. (Supp. I) 7255 is sufficient to support the subpoenas issued to petitioners, even though Title III itself does not refer explicitly to the

use of subpoenas in performing the subsidization study. The court explained (Pet. App. 6a):

> Since DOE * * * already possessed subpoena power for a general study of subsidization when Congress passed Title III, that statute's silence on subpoena power would seem to be of no consequence: Congress would have had to build into Title III a clear withdrawal of subpoena power if it did not want DOE to issue subpoenas for the Title III study.

The court of appeals also determined that "[t]he oil companies' procedural objections to the subpoena merit little attention" (Pet. App. 12a). The court saw no reason to disagree with DOE's position that the administrative review procedure established by the agency's regulations does not apply to the subpoenas in this case. Moreover, the court concluded (*ibid.*), neither the Administrative Procedure Act nor the Due Process Clause requires an agency to promulgate review regulations applicable to all subpoenas that the agency issues. The court of appeals agreed with the district court that the opportunity for a judicial hearing is enough to satisfy constitutional guarantees, and the court found no evidence that the district court proceeding in this case was unfair or unreasonable. The court of appeals thus upheld enforcement of the subpoenas but imposed a protective order (*id.* at 14a-21a) designed to afford petitioners approximately the same safeguards already accepted by DOE as part of the negotiated settlement with the six oil companies that voluntarily complied with the subpoenas.[6]

---

[6]The primary protections afforded by the court's order are as follows: Petitioners may designate subpoenaed documents as "confidential" or "extremely confidential," and materials placed in either category will be kept in locked files and will be used by DOE only under secure conditions. "Extremely confidential" materials will generally remain in the company's possession (subject to inspection and, if necessary, copying by DOE employees) and will not become agency records subject to public disclosure under the Freedom of Information Act. No government agency will exercise whatever discretion it might otherwise have under the FOIA to release subpoenaed materials exempt from mandatory disclosure.

Only one potentially significant protection was included in the DOE agreement with the six companies that complied voluntarily with the subpoenas but not in the court of appeals' protective order applicable to petitioners. It concerns the use of subpoenaed information by the Department of Justice and the Federal Trade Commission. Congress directed that the Secretary of Energy should conduct the PMPA study "in consultation with the Chairman of the

Judge Wilkey dissented. In a brief opinion (Pet. App. 22a), he announced his agreement with petitioners' contentions that DOE lacks statutory authority to issue the subpoenas and that, in any event, the subpoenas are too broad and burdensome.

5. The court of appeals' judgment initially ordered petitioners to produce the subpoenaed documents by March 3, 1980, two weeks before the court's mandate ordinarily would have issued under Fed. R. App. P. 41(a) (Pet. App. 16a, 24a). Petitioners moved to stay the mandate, and the court granted the motion "to and including March 10, 1980, on which date the Clerk is directed to issue the mandate in these cases" (*id.* at 26a). Petitioners applied to this Court for a stay of the court of appeals' mandate pending the filing and disposition of the present petitions for certiorari. On March 7, 1980, the Chief Justice requested a response to the stay applications and granted a temporary stay pending further order of the Court. The Court denied the stay applications on March 17, 1980 (Nos. A-756, A-760, and A-761), and petitioners have submitted documents to DOE that they assert represent full compliance with the DOE subpoenas.

ARGUMENT

The courts below correctly enforced the DOE subpoenas. The decision of the court of appeals does not conflict with the ruling of any other circuit or with any previous decision of this Court. Moreover, the significance of the questions presented by petitioners is limited to the three subpoenas at issue in this case. Title III of the PMPA was enacted for a limited purpose: Congress wished to instruct DOE to conduct a single study of oil company subsidization of wholesale and retail motor fuel sales with profits earned by other company operations. That study will be completed shortly, and Title III will have no further effect. DOE will not issue subpoenas to acquire any additional information related to the task assigned by Congress. Under these circumstances, review by this Court is not warranted.

1. The court of appeals correctly held that DOE was empowered to conduct the subsidization study, even before the PMPA directed the agency to do so, and that therefore the subpoena authority conferred by the

---

Federal Trade Commission and the Attorney General and other agencies as the Secretary deems appropriate * * *." 15 U.S.C. (Supp. II) 2841(a). Without the approval of the Department of Justice or the FTC, DOE assured the six voluntarily complying companies that any information they produced in response to the subpoenas would not be used by either the Department of Justice or the FTC for any purpose other than the PMPA study. Petitioners sought inclusion of a similar provision in the court of appeals' protective order. The court of appeals refused (Pet. App. 15a n.8), holding that no such additional protection was required by law. The court stated (*ibid.*):

> [Petitioners] have not alerted us to any authority, either in general or in the text or legislative history of PMPA, for requiring such extraordinary protection. Thus, we are loath to make such protection part of our Protective Order, especially since Title III expressly provides for consultation between DOE and other agencies.

DOEOA, 42 U.S.C. (Supp. I) 7255, was properly invoked by the agency in performing the inquiry mandated by Congress.[7]

Congress created DOE to "promote the general welfare by assuring coordinated and effective administration of Federal energy policy and programs." 42 U.S.C. (Supp. I) 7112. In particular, Congress intended "to promote the interests of consumers through the provision of an adequate and reliable supply of energy at the lowest reasonable cost; * * * to foster and assure competition among parties engaged in the supply of energy and fuels; * * * [and] to foster insofar as possible the continuing good health of the Nation's small business firms * * * involved in energy production, transportation, research, development, demonstration, marketing, and merchandising * * *." 42 U.S.C. (Supp. I) 7112(9), (12), (17).

To accomplish these goals, Congress provided for the appointment of eight Assistant Secretaries of Energy, one of whom is responsible for "the promotion of competition in the energy industry and for * * * assisting the Secretary

---

[7]Because the district court and the court of appeals determined that the Secretary's subpoena authority under Section 645 of the DOEOA, 42 U.S.C. (Supp. I) 7255, is sufficient to support the subpoenas in this case, they found it unnecessary to consider the government's additional argument that the disputed subpoenas were validly issued under the statutory authority conferred on the FEA Administrator by Section 13(e) of the FEAA, 15 U.S.C. 772(e), and transferred to the Secretary by Section 301(a) of the DOEOA, 42 U.S.C. (Supp. I) 7151(a) (Pet. App. 5a n.4, 34a). The FEAA specifically directed the Administrator to respond to requests for information from congressional committees, 15 U.S.C. 774(d), and to perform such additional tasks as might be assigned by Congress, 15 U.S.C. 764(b)(12). Although, as the courts below held, resolution of the question is not necessary for the disposition of this case, Section 13(e) of the FEAA does provide a separate and independent basis for upholding the challenged subpoenas.

in the formulation and analysis of policies, rules, and regulations relating to competition and consumer affairs." 42 U.S.C. (Supp. I) 7133(a)(7). In addition, Congress established the Energy Information Administration within DOE to gather and disseminate information on the energy industry, including economic and statistical data. 42 U.S.C. (Supp. I) 7135(a)(1) and (2). Congress transferred to EIA the functions previously assigned to the Office of Energy Information and Analysis in the Federal Energy Administration. 42 U.S.C. (Supp. I) 7135(c). Among these functions is the maintenance of information on the economic structure of the energy supply system, "including patterns of ownership and control of mineral fuel and nonmineral energy resources and the production, distribution, and marketing of mineral fuels and electricity * * *." 15 U.S.C. 790a(b)(1). Finally, the DOEOA requires the Secretary to transmit an annual report to Congress addressing, *inter alia*, the effectiveness of competitive and regulatory practices of government and private entities. 42 U.S.C. (Supp. I) 7267(5).

The study that DOE was ordered to conduct under Title III of the PMPA was thus well within the Secretary's previously-existing statutory authority, and the court of appeals was fully justified in concluding (Pet. App. 6a) that the disputed subpoenas were properly issued "[f]or the purpose of carrying out the provisions of [the DOEOA]" and "with respect to [the] functions vested in, or transferred or delegated to, the Secretary or [his] agents by [the DOEOA]." 42 U.S.C. (Supp. I) 7255. The silence of Title III of the PMPA on the availability of subpoena power for the subsidization study did not deprive the Secretary of authority he already possessed. There is simply no reason to construe the congressional mandate for the PMPA study as restricting the means by

which the Secretary can perform a task he was already empowered to perform before the PMPA was enacted. If any inference must be drawn from the PMPA, it is to the contrary: once Congress decided to direct the Secretary to conduct a study he previously could have undertaken at his own initiative, Congress presumably had every motive to ensure that the Secretary would use all available means to produce the most thorough and informative report possible. In any event, the mere omission of any mention of the subpoena power in Title III of the PMPA should not be interpreted as a limitation of powers already expressly conferred. If the Secretary is to be stripped of a power explicitly granted by statute, the later statute must be at least equally explicit. See *TVA* v. *Hill*, 437 U.S. 153, 189-190 (1978).

Petitioners advance two arguments in support of their view that DOE may not issue subpoenas in aid of the PMPA study. First, they contrast Section 301(c) of the PMPA, 15 U.S.C. (Supp. II) 2841(c), with the explicit grant of enforcement authority to the Federal Trade Commission in Title II of the same statute. Section 203(a), 15 U.S.C. (Supp. II) 2823(a). Section 301(c) provides that, in conducting the subsidization study, the Secretary "shall give appropriate notice and afford interested persons an opportunity to present written and oral data, views and arguments concerning such study." Section 203(a) provides that, with respect to the octane testing and disclosure requirements imposed by Section 202 of the PMPA, 15 U.S.C. (Supp. II) 2822, the FTC "shall have procedural, investigative, and enforcement powers, including the power * * * to require the filing of reports, the production of documents, and the appearance of witnesses, as though the applicable terms and conditions of the Federal Trade Commission Act * * *

were part of [Title II of the PMPA]." The differences between these provisions, petitioners argue, show that Congress intended to permit FTC subpoenas under Title II but not DOE subpoenas under Title III. The court of appeals correctly observed that the purpose of Title II is completely different from that of Title III and, accordingly, the provisions of one part of the PMPA offer little or no assistance in the interpretation of another. As the court of appeals explained (Pet. App. 9a):

> Title II is primarily a directive to *private* parties to fulfill general reporting requirements imposed by the Act. Title II, however, secondarily establishes the FTC as the enforcing agency, and Congress may have felt a need to spell out the FTC's enforcement powers in some detail. Title III, in contrast, is primarily a directive to a government agency, the Department of Energy, and Congress may reasonably have understood Title III to incorporate DOE's general enforcement powers from the DOEOA.

Second, petitioners point to the legislative history of Title III of the PMPA, where they purportedly find evidence that Congress intended not to permit the use of subpoenas in connection with the subsidization study. As the district court and the court of appeals correctly concluded, however, the legislative history reveals no such intent. We adopt fully the court of appeals' detailed commentary (Pet. App. 8a) on the remarks by Senator Bumpers to which petitioners attribute such great significance (see, *e.g.*, 79-1384 Pet. 11-15). Those remarks show at most that one Senator may have been temporarily confused about the availability of the Secretary's subpoena power in connection with the PMPA study.

The exchange from which the remarks are taken demonstrates mainly that all the Senators involved in the debate sought to encourage voluntary cooperation by the oil companies in order to enable DOE to meet the statutory deadline for completion of the study.[8] Senator Bumpers made his comments in the course of debate on an amendment proposed by Senator Kennedy that would have directed DOE to share information acquired in the course of the study with the FTC and the Department of Justice (Pet. App. 61a-62a). Senator Bumpers opposed the amendment, arguing that, if it were enacted, oil companies would be less likely to submit needed information voluntarily to DOE (*id.* at 63a-66a). The question under discussion was not whether DOE could compel the production of information by subpoena, but whether Senator Kennedy's amendment would reduce the probability of voluntary cooperation by the oil companies, cooperation that Congress had every reason to encourage in light of the time constraints within which the study was to be performed. The court of appeals was correct, therefore, in concluding that Senator Bumpers' apparent assumption about the Secretary's subpoena power "was simply not centrally relevant to the debate" and did not provoke a challenge from any other Senator for that reason (*id.* at 8a).

Moreover, this Court has recognized that the remarks of a single legislator, even a statute's sponsor, are not necessarily dispositive in the judicial interpretation of an

---

[8]Section 301(d)(1) of the PMPA, 15 U.S.C. (Supp. II) 2841(d)(1), directed the Secretary to report the results of the study to Congress by December 19, 1979. In large part because of difficulties encountered in obtaining necessary information, the Secretary has informed Congress that the study will not be available before April 30, 1980.

Act of Congress. *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 311 (1979). This principle applies with special force when the remarks in question are cited not only for what they may imply about the statute under consideration when they were made but also, as in this case, for what they may suggest about the proper construction of an earlier law not the subject of legislative attention at the time of the statements. See, *e.g.*, *American Maritime Ass'n* v. *Blumenthal*, 458 F. Supp. 849, 859 (D.D.C. 1977), aff'd, 590 F. 2d 1156 (D.C. Cir. 1978), cert. denied, 441 U.S. 943 (1979). Legislative history of the latter kind ordinarily should receive little weight.

2. Petitioners' procedural objection to DOE's failure to provide for administrative review of the disputed subpoenas is insubstantial. The DOE regulation on which petitioners rely does not apply to the subpoenas issued in connection with the PMPA study. As the district court correctly observed (Pet. App. 34a-35a), the review procedure established by DOE applies only to subpoenas issued in connection with the agency functions described in 10 C.F.R. Parts 209-214, none of which is implicated here. Moreover, even if petitioners were correct in asserting that DOE's regulations were intended to make administrative review available for all subpoenas issued by the agency, they have not identified any way in which the failure to afford that review prejudiced them in this case.[9] As we discuss in the paragraphs that follow, petitioners had an opportunity to object to the subpoenas in the district court, and they have not shown why that opportunity was diminished because prior administrative review was not provided.

---

[9]Petitioner Shell is incorrect in asserting that an agency's mere failure to comply with its own regulations "results in a deprivation of due process of law" (79-1394 Pet. 14). See *United States* v. *Caceres*, 440 U.S. 741 (1979).

Neither the Administrative Procedure Act nor the Due Process Clause requires initial review of a subpoena within the issuing agency. The APA, 5 U.S.C. 555(d), provides for judicial enforcement of administrative subpoenas but does not impose any obligation on government agencies to permit administrative challenges before seeking such enforcement. The district court and the court of appeals properly refused to engraft an additional administrative procedure onto those adopted by the agency at its own initiative. See *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519 (1978).

Petitioners' due process rights were adequately protected through the district court hearing on DOE's request for enforcement of the subpoenas. It is only after judicial enforcement of a subpoena that sanctions may be imposed for noncompliance. *Reisman* v. *Caplin*, 375 U.S. 440 (1964). Petitioners were afforded a full opportunity to raise all their objections to the subpoenas in the district court.

This Court long ago acknowledged that the role of the district court in subpoena enforcement actions is a limited one. The court must determine only that the subpoenaed information is sought for a lawfully authorized purpose, that the documents are relevant to the agency's inquiry, and that the demand is reasonable. *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186 (1946). The procedure for judicial enforcement of administrative subpoenas is summary and *sui generis*. It is not a review on an administrative record under the APA, 5 U.S.C. 706, as petitioner Shell seems to suggest (79-1394 Pet. 16-19). Even now, petitioners do not raise any objection to the subpoenas that was not fully litigated in the courts below, and they do not describe any way in which meritorious

objections were rendered ineffective by the procedure followed by DOE. Under these circumstances, and particularly in light of the safeguards afforded by the court of appeals' protective order, enforcement of the subpoenas was proper.[10]

[10]Petitioner Shell's assertion (79-1394 Pet. 20-22) that it is entitled to precisely the same protection to which DOE agreed in negotiations with the six voluntarily complying companies is without merit. In order to obtain the subpoenaed information from the companies quickly and with a minimum of legal difficulty, DOE agreed to a protective condition not required by law and not approved by the Department of Justice or the FTC (see note 6, *supra*). Nothing in the PMPA requires that federal agencies be precluded from using properly obtained information for any legitimate governmental purpose, and the court of appeals correctly held that petitioners are not entitled, as a matter of right, to impose restrictions on the Department of Justice or the FTC, merely because DOE agreed to such restrictions as part of a negotiated settlement with other companies that received subpoenas.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

ALICE DANIEL
Assistant Attorney General

WILLIAM G. KANTER
ROBERT J. FRANZINGER
ANN F. COHEN
THOMAS R. KLINE
Attorneys

MAY 1980

DOJ-1980-05